ACS, LLC *and* United Food and Commercial Workers International Union, Local 1096.[1] Case 28–CA–19291

September 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 6, 2005, Administrative Law Judge Thomas M. Patton issued the attached decision. The Charging Party filed a "Supplement to Exceptions and Brief in Support Thereof."[2] The Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the supplemental exceptions and briefs[3] and has decided to affirm the judge's rulings, findings, and conclusions as discussed below, and to adopt the recommended Order.

The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to arbitrate a number of the Union's grievances. For the following reasons, we agree with the judge that the Respondent did not violate the Act.

Facts

The parties' collective-bargaining agreement (CBA) has a no-strike, no-lockout provision and requires that all disputes and grievances be resolved under the grievance procedure in the agreement. The CBA includes a two-step formal grievance procedure prior to either arbitration or judicial enforcement. The CBA provides:

ARTICLE IV–GRIEVANCE PROCEDURE

3. If the grievance is not resolved at the conference as provided for In STEP TWO above, then either party may request, in writing, within fifteen (15) days of the conference that the matter proceed in accordance with ARTICLE V. Failure of either party to give such written notice shall waive the rights to proceed in accordance with ARTICLE V.

ARTICLE V–ARBITRATION

1. Disputes concerning contract interpretation, the disposition of assets, the right of sale, the right to control the number of hours that the plant be open or closed down either for lack of business or for economic reasons, or matters which involve management decision or business judgment shall not be subject to arbitration. Procedural questions of compliance with the contract shall be subject to judicial determination and not arbitration. Either party may seek judicial relief with regard to any of the foregoing.

Any other disputes concerning working conditions, safety or other matters not excluded herein, shall be subject to arbitration; provided a written notice has been given as provided in ARTICLE IV, Section 3 above. The Company and the Union shall attempt by mutual agreement to appoint an arbitrator, then either party may request a panel of arbitrators to be submitted by the Federal Mediation and Conciliation Service, State Conciliation Service or American Arbitration Association, and an arbitrator shall be selected from such panel by the process of each party alternately eliminating one of the suggested names until there remains only one name on the panel. . . .

Between March 4 and May 8, 2003, Union President Pete Maturino filed the following five grievances:

[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005.

[2] On June 27, 2005, the Charging Party filed exceptions to the judge's decision, stating that it "joins in the Exceptions to be filed by Counsel for the General Counsel." Subsequently, the General Counsel decided not to file exceptions, and on July 19, 2005, the Charging Party filed a "Supplement to Exceptions to Decision and Brief in Support Thereof." On August 23, 2005, the Board issued an order granting the Respondent's motion to strike the Charging Party's June 27 exceptions on the ground that they did not meet the requirements of Sec. 102.46(b) and (c) of the Board's Rules and Regulations. The Board also denied the Respondent's motion to strike the Charging Party's July 19 Supplement to Exceptions, finding that it was in substantial compliance with Sec. 102.46. The Board deferred ruling until the decision on the merits on the Respondent's additional contention that the Charging Party raised arguments in the Supplement that had not been raised before the judge. In light of our decision on the merits, we find it unnecessary to pass on the Respondent's contention.

[3] Although the Charging Party stated generally in its supplemental exceptions that it took exception "to the conclusions of law and the Order in its entirety," the only substantive portion of the judge's decision to which it specifically excepted and about which it supplied any argument was sec. III,B,2,b, entitled "Analysis of Refusals to Arbitrate." In light of the Charging Party's failure to specify any other areas of disagreement with the judge's decision, we consider the Charging Party's general exception to be waived as to all other portions of the judge's decision. See Sec. 102.46(b)(2) of the Board's Rules ("Any exception . . . not specifically urged shall be deemed to have been waived."). Accordingly, although the Charging Party has filed exceptions to the judge's legal analysis concerning the alleged unlawful refusals to arbitrate, there are no valid exceptions to the findings in sec. III,B,2,a,1–7 of the judge's decision dealing with the facts relating to those allegations.

We further find that no valid exceptions were filed to the judge's disposition of the posthearing motions (sec. I) or to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) by requiring seasonal workers to submit to drug testing under the negotiated drug policy (sec. III,B,1).

(1) Darlene Brazil Performance Memo and Suspension Grievance[4]

(2) Michelle Almaguer Work Assignment Grievance[5]

(3) Notice Posting Grievance[6]

(4) Steve Hobbs and Darlene Brazil Grievance[7]

(5) Performance and Attitude Grievance[8]

None of these five grievances was resolved at step two and on June 10, the Union's attorney sent separate letters to the State Mediation and Conciliation Service requesting a panel of arbitrators for each grievance. Each of the letters stated, inter alia, "This matter is a labor dispute involving interpretation and application of a collective-bargaining agreement." A copy of each letter was sent to Respondent's Manager John Smith. The Respondent refused to arbitrate these grievances, contending that they are not subject to arbitration under the CBA.

The Union also grieved the November 2003 drug testing of recalled seasonal workers, and on December 2, 2003, the Union requested that the parties "by-pass Step 2 of the grievance procedure and move to Article 5-Arbitration." On December 15, 2003, the Respondent refused to proceed to arbitration and suggested that the Union proceed to Step 2. The grievance was not resolved at Step 2 and on January 8, 2004, the Union requested arbitration in a letter from Maturino to Smith. The request for arbitration was renewed in a letter from the Union's attorney to the Respondent's attorney on February 8, 2004. On February 12, 2004, the Respondent refused to arbitrate the drug-testing grievance, contending that it is not a dispute that is subject to arbitration under the CBA.[9]

Analysis

The complaint alleges that the Respondent's refusal to arbitrate grievances was both an unlawful contract modification and an unlawful unilateral change.[10] In refusing to arbitrate the grievances, the Respondent relied on the narrow language of the arbitration clause, which excludes from arbitration disputes "concerning contract interpretation, . . . or matters which involve management decision or business judgment" as well as "[p]rocedural questions of compliance with the contract." The Charging Party asserts that the grievances at issue here were not excluded by the language of the contact, and that even assuming that there was some arguable basis for the Respondent's position, the Respondent was required to arbitrate the arbitrability of the grievances. The Charging Party further argues that the Respondent's conduct is a "wholesale" repudiation of the arbitration procedure.[11] For the following reasons, we agree with the judge that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to arbitrate the grievances at issue in this case.

Not every employer refusal to arbitrate violates Section 8(a)(5) and (1) of the Act. *Velan Valve Corp*., 316 NLRB 1273, 1274 (1995), citing *Mid-American Milling Co*., 282 NLRB 926 (1987). An employer's refusal to arbitrate grievances, pursuant to a collective-bargaining agreement, violates Section 8(a)(5) of the Act if the employer's conduct amounts to a unilateral modification or wholesale repudiation of the collective-bargaining agreement.[12] We find that, under the circumstances of this case, the Respondent's refusal to arbitrate the grievances at issue here did not constitute a unilateral modification or wholesale repudiation of the contractual arbitra-

[4] Brazil received a performance memo suspending her for 3 days for her negative and uncooperative attitude.

[5] The Union contended that Almaguer was improperly hired and paid from the piece rate pool generated by senior unit employees.

[6] The Union contended that the provisions described in a notice to employees that had been posted by predecessor employer, Advanced Cooling, effective January 21, 2001 must be followed by ACS. The notice memorialized a supplemental agreement reached during the term of the collective-bargaining agreement between the Union and Advanced Cooling regarding pay scale, seniority, and crew sizes when additional employees were hired.

[7] The Union contended that an operator was improperly given a share of group piecework pay for work done by Hobbs and Brazil.

[8] This grievance concerned a written warning issued to the entire crew on February 27, 2003 for asserted violations of company policy and a work rule.

[9] Although the complaint also alleges that the Respondent refused to arbitrate a December 12, 2003 "expansion of operations" grievance concerning the staffing and pay of employees during the implementation of an expansion and diversification of plant operations, the judge found that the General Counsel had not shown a request to arbitrate that grievance. The judge also found that the Respondent did not refuse to arbitrate a different "seniority and salary scale violation" grievance, which was not the subject of a complaint allegation. Accordingly, the judge found no unlawful refusal to arbitrate these grievances based on a failure of proof. Because, as noted above, no exceptions were filed to the judge's factual findings, the "expansion of operations" grievance and the "seniority and salary scale violation" grievance are not before us for decision.

[10] The complaint alleges that the Respondent failed to arbitrate grievances "without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct" (par. 6(m)), and that by refusing to arbitrate grievances the Respondent has "failed to continue in effect all the terms and conditions of employment" in the parties' CBA (par. 6(n)) and has done so "without the Union's consent." (par. 6(o)). The complaint further alleges that by this conduct, the Respondent has "failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act." (par. 7).

[11] The Charging Party does not pursue the complaint's alternative theory of a violation (unlawful unilateral change).

[12] *3 State Contractors*, 306 NLRB 711, 715 (1992); *Indiana & Michigan Electric Co*., 284 NLRB 53, 59–60 (1987).

tion provision and accordingly, did not violate Section 8(a)(5).

In *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), cited by the Union, the Supreme Court held that in a Section 301 suit to compel arbitration, a reviewing court's role is a limited one, "strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made." Id. at 582. In such cases, the Court noted, "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Id. at 582–583. Assuming without deciding the applicability of that standard to a Section 8(a)(5) case,[13] it clearly has been met. As set forth above, the parties' CBA contains a very narrow arbitration clause, expressly excluding, inter alia, "[d]isputes concerning contract interpretation." As to five of the six grievances at issue, the Union itself initially took the position that the grievance involved contract interpretation. Thus, in the Union's letters requesting the arbitration of those grievances, the Union's attorney stated that the "matter is a labor dispute involving interpretation and application of a collective-bargaining agreement." Given the Union's own characterization of the five grievances as involving contract interpretation and the express exclusion of such disputes from arbitration, we find that the Respondent was under no obligation to arbitrate these five grievances.[14] With respect to the sixth grievance (drug testing), even assuming arguendo that it did not fall under the "contract interpretation" exclusion, the Respondent's refusal to arbitrate a single grievance would not amount to a unilateral modification or wholesale repudiation of the arbitration procedure. At most, that amounted to a breach of contract, which "is not per se an unfair labor practice." *Indiana & Michigan Electric*, supra, 284 NLRB at 59.[15]

The cases relied on by the Union to support its argument that the Respondent was required to arbitrate the grievances are distinguishable. While *Desert Coca Cola v. Teamsters Local 14*, 335 F.2d 198 (9th Cir. 1964), held that the grievance in that case was arbitrable, the court relied on the breadth and inclusiveness of the arbitration clause[16] and the uncertainty of the exclusion to

[13] Member Liebman finds the *Warrior & Gulf* standard to be applicable here. *Exxon Chemical Co.*, 340 NLRB 357, 359 fn. 11 (2003) (citing *Warrior & Gulf*, supra), enfd. 386 F.3d 1160, 1166 (D.C. Cir. 2004) (same). See her position set forth in fn. 15, infra.

[14] See *AT&T Technologies Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit."). In light of the parties' narrow arbitration clause, we find that the Respondent did not agree to submit these disputes to arbitration.

We also reject the Union's argument that the Respondent was required to arbitrate the arbitrability of the grievances. Generally, the question of whether the parties agreed to arbitrate a dispute is decided by the courts, not the arbitrator, unless the "parties clearly and unmistakably provide otherwise." *AT&T Technologies*, supra, 475 U.S. at 649. In this case, the parties did not "clearly and unmistakably provide" that disputes over arbitrability were to be decided by the arbitrator. Accordingly, the Respondent had no obligation to submit the issue of the arbitrability of the grievances to an arbitrator.

[15] In dismissing the complaint, the judge found that the Respondent had a "sound arguable basis" for its position that the grievances concerned contract interpretation and were therefore excluded from arbitration. Chairman Battista and Member Schaumber agree with the judge's rationale. They note that the judge's rationale is consistent with the Board's recent decision in *Bath Iron Works*, 345 NLRB No. 33 (2005), which held that in cases alleging an unlawful modification of a contract, rather that an unlawful unilateral change in employees' terms and conditions of employment, the "Board is limited to determining whether the employer has altered the terms of a contract without consent of the other party." Id. slip op. at 3. Where the issue turns on the resolution of two conflicting reasonable interpretations of the contract, i.e., where there is a sound arguable basis for both positions and the employer is not motivated by union animus or acting in bad faith, the Board will not ordinarily find a violation. Id. slip op. at 4. Chairman Battista and Member Schaumber agree with the judge that the Respondent had a "sound arguable basis" for its belief that the grievances were excluded from arbitration, and that the Respondent was not motivated by union animus or acting in bad faith. Accordingly, they find that the Respondent did not unlawfully modify the contract when it refused to arbitrate.

Chairman Battista and Member Schaumber recognize that under *Steelworkers*, courts typically will order arbitration, under Sec. 301, unless it can be said "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." However, the issue here is whether the refusal to arbitrate was lawful under Sec. 8(a)(5) of the Act. Sec. 301 is concerned with alleged breaches of contract, and as our colleague acknowledges, a breach of contract is not necessarily an unfair labor practice. Chairman Battista and Member Schaumber believe that there is no unfair labor practice if the employer has a "sound arguable basis" for its position.

In sum, although Chairman Battista and Member Schaumber concur that there was no violation under the *Steelworkers* test, they also conclude that the appropriate test is *Bath*, and that there is also no violation under that test.

Member Liebman dissented in *Bath Iron Works* from the majority's reliance on the "sound arguable basis" approach to decide the unfair labor practice issue presented there. In her view, a "sound arguable basis" analysis is even less appropriate here because it is the exact opposite of the standard set by the Supreme Court in *Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. 574, 582–583 (1960), for determining arbitrability (arbitration can be denied only if it can be said "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."). However, Member Liebman joins her colleagues in dismissing the complaint in this case because she finds, for the reasons set forth above, that the *Warrior & Gulf* standard has been met here and that the Respondent's conduct did not amount to a unilateral modification or wholesale repudiation of the arbitration procedure. Therefore, she agrees that the Respondent did not violate Sec. 8(a)(5) and (1) by refusing to arbitrate the grievances.

[16] "The decision of the arbitrator . . . upon any issue concerning the terms of this Agreement shall be final, binding and conclusive upon all parties concerned."

find the dispute arbitrable. 335 F.2d at 200–201. Likewise, *Phoenix Newspapers v. Phoenix Mailers Union*, 989 F.2d 1077 (9th Cir. 1993);[17] *Carpenters Local 1780 v. Desert Palace*, 94 F.3d 1308 (9th Cir. 1996);[18] and *Teamsters Local 70 v. Interstate Distributor Co.*, 832 F.2d 507 (9th Cir. 1987),[19] all involved arbitration clauses that were far broader than the one here, which is extremely limited.

Given the narrow language of the exclusion in the parties' CBA, as well as the Union's own characterization of the disputes as involving contract "interpretation," we find that the Respondent's conduct did not amount to a unilateral modification or wholesale repudiation of the contractual arbitration procedure. For these reasons, we shall dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. September 30, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

William Mabry III, Esq., for the General Counsel.
A. James Clark, Esq. and *Theresa Legere, Esq.*, of Yuma, Arizona, for the Respondent.
David A. Rosenfeld, Esq., of Oakland, California, and *Pete Maturino, Representative*, of Salinas, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS M. PATTON, Administrative Law Judge. This case was tried on November 16–17, 2004, in Yuma, Arizona.

The charge was filed by United Food and Commercial Workers International Union, Local 1096, AFL–CIO, CLC (the Union) on January 30, 2004. The complaint issued on April 30, 2004. The complaint alleges violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by ACS, LLC (the Respondent). The Respondent answered, denying any violation of the Act.

The General Counsel and the Respondent have filed posthearing briefs that have been carefully considered. The Union filed a statement that it joins in the brief of the General Counsel. On the entire record, including my observation of the demeanor of the witnesses and after considering the briefs and arguments of counsel, make the following findings of fact,[1] conclusions of law, and recommended order.

I. POSTHEARING MOTIONS

A. Motion to Amend the Complaint

At the opening of the hearing the General Counsel moved to amend the complaint in the manner set forth in a notice of intent to amend. The motion was granted in part and denied in part. The Respondent opposed the amendment. On brief the General Counsel renews the denied aspects of the motion to amend. The position of the General Counsel is that the amendments should be allowed to permit the consideration of unspecified past practices.

The amendments allege that the Respondent was a successor to Advanced Cooling Systems, Inc., a different entity, as of July 2, 2001, when Respondent assumed the Advanced Cooling operation in Yuma, Arizona.

The amendments not allowed are that Respondent is a disguised continuance and an alter ego of Advanced Cooling, with a bargaining relationship since 1984, and that several individuals were agents of Respondent and Advanced Cooling. Advanced Cooling is not named in the charge, has not been made a party, and has not been served. The General Counsel reserved the option of urging that Advanced Cooling was jointly liable for unfair labor practices by ACS. There has been no claim that the proposed agency allegations are related to any issue other than the proposed disguised continuance and alter ego allegations.

There are two central issues in the case. One is whether ACS violated the Act by requiring drug tests for union-represented employees recalled from layoff. The other is whether ACS violated the Act by refusing to arbitrate certain grievances under a collective-bargaining agreement with the Union.

The General Counsel has not demonstrated how the litigation of the disguised continuance and alter ego questions would be probative on the allegation that the challenged drug test requirement was an unprivileged unilateral change. There is no dispute that the challenged drug test was a new requirement first used about a year after Respondent assumed the operation and had entered into a new collective-bargaining agreement covering the collective-bargaining unit represented by the Union.

[17] "[P]arties agreed to submit *all* disputes over the interpretation and application of *any* clause of the agreement to arbitration." 989 F.2d at 1080.

[18] The arbitration clause requires all disputes "regarding the interpretation or application of the provisions" of the agreement to be submitted to arbitration. 94 F.3d at 1310.

[19] "Any grievance or controversy affecting the mutual relations of the Employer and the Union" was to be resolved by arbitration. 832 F.2d at 508.

[1] In assessing credibility, testimony contrary to my findings has not been credited, based upon a review of the entire record and consideration of the probabilities and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

Regarding the refusals to arbitrate certain grievances, the attorneys for the Respondent twice represented at the hearing that Advanced Cooling had never arbitrated a grievance. Those representations are unchallenged with an offer of proof or otherwise.

The renewed motion to amend is denied pursuant to Section 102.17 of the Board's Rules and Regulations as not being just. The motion was untimely without extenuating circumstances; Advanced Cooling was not given notice; it was likely that the hearing would be delayed and extended if the denied amendments were allowed; it was not shown that there was a substantial likelihood that the disallowed amendments, if proven, would be probative on the merits of the violations alleged; and granting the motion would be inconsistent with the orderly administration of the Act.

B. Motion to Reopen the Record

On December 22, 2004, the Respondent filed with its posthearing brief a motion to reopen the record and admit certain documents. The motion is made a part of the record. The documents that are the subject of the motion were filed with the motion and marked Respondent's Exhibits 7 and 8 (herein R. Exh. 7 and R. Exh. 8).

R. Exh. 7 is Respondent's statement of facts in support of its Motion for Summary Judgment filed in July 2004, with 34 attached exhibits, marked 1–26, including 17A–17E and 19A–19E. The exhibits to R. Exh. 7 are identified herein as R. Exh. 7.1–7.26.

The General Counsel opposes the receipt of the statement of facts and its exhibits and moves to strike those portions of the Respondent's brief that refer to those documents based on noncompliance with unspecified provisions in the Board's Rules and Regulations. The General Counsel contends that affidavits of Karen Burreson (R. Exh. 7.5) and Theresa Legere (R. Exh. 7.9) should not be received, since they did not testify at the hearing. The General Counsel contends that R. Exhs. 7.1–7.4, 7.6–7.8, 7.10–7.15, 7.17B–7.17E, 7.18, 7.19A–7.19E, 7.20 and 7.22–7.24 have already been admitted into evidence and are therefore duplicative and cumulative. The General Counsel asserts that R. Exh. 7.16, 7.21 and 7.25 are irrelevant. R. Exh. 7.17A and R. Exh. 7.26 are not specifically addressed.

The Motion for Summary Judgment was incorporated into the formal papers prepared in advance of the hearing and introduced by the General Counsel. The Motion for Summary Judgment refers extensively to the statement of facts, R. Exh. 7. Counsel for ACS states that he was merely following the local rules in the United States District Court, District of Arizona, which he accurately states require the filing of a separate statement of facts on which a party relies in support of a Motion for Summary Judgment. The formal papers, which were assembled by the Agency, include the General Counsel's brief in opposition to the Motion for Summary Judgment that includes statements regarding the facts. I conclude that the statement of facts and the exhibits thereto are a part of the motion for summary judgment and it is received as R. Exh. 7, as a part of the formal papers in the case, with the limitations discussed below.[2]

Documents that are incorporated in the formal papers are not necessarily received for the truth of their contents. Except to establish admissions of a party or to impeach, affidavits generally are received substantively in unfair labor practice proceedings only if it is established that the declarant is deceased or unavailable, or the taking of testimony poses a threat to the health of the witness, because there is no opportunity for the opponent to cross-examine or the judge to observe demeanor. There has been no contention that Karen Burreson or Theresa Legere come within these exceptions, or that they were otherwise unavailable. I shall not consider the affidavits of Karen Burreson (R. Exh. 7.5) and Theresa Legere (R. Exh. 7.9) substantively to support the Respondents position. See *Marine Engineers District 1 (Dutra Construction)*, 312 NLRB 55, 55 (1993).

R. Exh. 7.26 is a letter from the union president to the Respondent on the Union's letterhead, signed by the union president and the content relates to matters the union president testified about. The General Counsel does not contend that the document is not authentic. My comparison of the letter with other letters in the record convinces me that the letter is authentic. Nevertheless, I have not relied on R. Exh. 7.26 substantively to support the Respondent's position. The content of the letter would not affect the ultimate decision in the case.

To the extent that the exhibits to R. Exh. 7 are acknowledged by the General Counsel to be duplicates of documents already in the record. I decline to strike those portions of the Respondent's brief that refer to the documents. Granting the motion would not serve the ends of justice. A review of the exhibits discloses that R. Exh. 7.17A was also admitted as R. Exh. 3.

The document designated R. Exh. 8 is Respondent's amended answer, dated November 12, 2004, which was not included in the formal papers, GC Exh. 1. The Respondent's unopposed posthearing motion to make the amended answer a part of the record is granted and it is received as R. Exh. 8.

II. JURISDICTION

The Respondent, ACS, LLC, is an Arizona limited liability corporation that is engaged in the vicinity of Yuma, Arizona, in the operation of commercial cooling, packing and shipping of fruits and vegetables. The pleading and the evidence show that Respondent meets the Board's standards for asserting jurisdiction based on its operations and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

III. THE LABOR ORGANIZATION

The pleading and the evidence show that United Food and Commercial Workers International Union, Local 1096, AFL–CIO, CLC UFCW Local 1000 is a labor organization within the meaning of Section 2(5) of the Act.

[2] The formal papers, GC Exh. 1, are voluminous and are in two volumes. When the General Counsel offered that exhibit, the parties were given leave to supplement the exhibit if documents had been inadvertently omitted because of administrative error.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union and ACS are parties to a written collective-bargaining agreement (the CBA) effective from November 20, 2002 to May 1, 2006, covering a unit of production employees (the unit) at a facility in Yuma, Arizona (the plant). There are approximately 30 employees in the unit. The parties agree, the record shows and I find that the Union is the exclusive collective-bargaining representative of the unit based under Section 9(a) of the Act. The unit consists of the following employees:

> All plant production employees engaged in the handling of commodities (excluding watermelon and broccoli icing) at its vacuum cooling plant in Yuma, Arizona at 4102 S. Ave 31/2 E; but excluding office clerical personnel, maintenance personnel, office managers and supervisory employees as defined by the Act.

The CBA was the first collective-bargaining agreement between ACS and the Union. ACS began operating the plant in 2001. The work performed at the plant was like the work that had been done previously by another entity, Advanced Cooling Systems, Inc. at a different facility in the Yuma area. There was a fire at the Advanced Cooling facility that apparently made it unusable. When ACS began operations at the plant in 2001, it hired employees and supervisors that had been employed by Advanced Cooling and performed similar work, albeit at a different location. ACS acknowledges, for the purposes of this proceeding, that ACS is a successor employer to Advanced Cooling, within the meaning of *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). The record evidence is consistent with ACS being a sucessor to Advanced Cooling. I find that for the purposes of this proceeding the Respondent ACS is a successor employer to Advanced Cooling Systems, Inc., as alleged in paragraphs 2(e) and 2(f) of the amended complaint.

The Union represented the Advanced Cooling employees before ACS assumed the operation. Advanced Cooling and the Union were parties to a collective-bargaining agreement covering the unit that had an expiration date of May 1, 2002. The Advanced Cooling agreement had a successor provision in typical form and from the time ACS began operating the plant until the effective date of the CBA, ACS maintained the wages and benefits of the unit that had previously been in effect at Advanced Cooling. The record does not show that ACS failed to comply with the Advanced Cooling contract prior to the effective date of the CBA.

B. Findings and Conclusions

1. Requiring drug tests for recalled employees[3]

The unit employees are primarily (and possibly entirely) seasonal workers. The CBA provides for seniority rights that are retained by seasonal workers during the off-season. Employees on layoff during the off-season are sent recall notices prior to the beginning of a new season. The recall rights are consistent with the practice before ACS began operating the plant. Because of the seasonal nature of the Respondent's business, employees retained their status as employees of ACS while on layoff. *Marlin-Rockwell Corp.*, 19 NLRB 648, 655 (1940), enfd. as modified on other grounds 116 F.2d 586, 588 (2d Cir.1941), cert. denied 313 U.S. 594 (1941).

When the seasonal employees were recalled for the season that began in November 2003, they were required to submit to drug testing as a condition of returning to work. The complaint alleges that this drug test requirement was imposed without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent regarding the requirement and its effects. This was the first time that recalled unit employees had ever been required to submit to drug testing before beginning work.

The CBA includes a management rights clause, article X, which includes the following provision:

> 2. Employees shall comply with all lawful rules and orders, including the Company's "Work Rules Policy", and "Alcohol and Substance Abuse Policy", not inconsistent with this Agreement, and agree to work for the Company in the capacity retained.

The "Alcohol and Substance Abuse Policy" (the drug policy) is attached to the CBA and the General Counsel acknowledges that the drug policy is incorporated in the CBA. The drug policy applies to all employees and applicants for employment and provides for testing for alcohol and illegal drugs. There are provisions for discipline and referral for treatment of those who fail drug tests. The drug policy requires all employees to be given a copy of the policy and the evidence does not show that ACS failed to provide a copy of the policy to the unit employees during the 2002 season. The policy provides for tests to be conducted in various situations. The drug policy states, in part:

> VII. TESTING
>
> . . .
>
> E. *Additional Testing*
>
> Additional testing may also be conducted as requires [sic] by applicable state or federal laws, rules, or regulations or deemed necessary by the Company. Upon initial implementation of this Substance Abuse Policy, all current employees will be subject to testing.

The evidence does not show that the CBA and drug policy were in effect when employees were recalled for the 2002 season. The complaint alleges that ACS violated Section 8(a)(1) and (5) by requiring recalled seasonal workers to submit to drug testing prior to beginning work in November 2003.

Drug and alcohol testing is a mandatory subject of bargaining. See *Johnson Bateman Co.*, 295 NLRB 180 (1989). The General Counsel contends that ACS did not require preseason drug testing prior to November 2003, and that ACS accordingly had a duty to consult with the Union concerning implementing testing of returning employees. ACS contends that drug testing was bargained for and incorporated in the CBA. ACS argues that when a contract provision addresses an employer action and gives the employer discretion to perform some act, the employer is not required to bargain before exercising its discre-

[3] Complaint paragraph 6(a).

tion. The Employer cites *NLRB v. Honolulu Star-Bulletin*, 372 F.2d 691,693 (9th Cir. 1967), denying enfd. 153 NLRB 763 (1965).

The CBA provision giving ACS the right to require additional testing "deemed necessary by the Company" is a clear and unmistakable waiver by the Union of bargaining regarding the Respondent's decision to require the additional drug testing. In an analogous situation, the Board concluded in *Johnson Bateman*, supra, that the unilateral implementation of an attendance incentive bonus plan was privileged. The Board found the reasoning of the Ninth Circuit in *NLRB v. Honolulu Star-Bulletin*, supra, to be particularly applicable circumstances where there are express contract terms that give an employer discretion to change a term or condition of employment otherwise subject to bargaining. *Johnson Bateman*, supra, at 189.

Assuming, without deciding, that there was not a clear and unmistakable waiver regarding the challenged drug testing, the evidence shows that ACS acted in accordance with the terms of the CBA as ACS construed it, there was a sound arguable basis for so construing the CBA, and there has been no showing that ACS was motivated by union animus or was acting in bad faith. In such circumstances there is not a violation. *Yellow Freight Systems, Inc*., 313 NLRB 309 (1993), and cases cited there. A different conclusion is not warranted merely because the present case involves drug testing. *Intrepid Museum Foundation, Inc.*, 335 NLRB 1 (2001).

The General Counsel also argues that there was a duty to bargain about the effects of the challenged testing. Assuming, without deciding, that the Union requested effects bargaining this contention lacks merit. The Drug Policy that is incorporated in the CBA addresses in detail the negotiated consequences when an employee fails a drug test. Thus, there was bargaining on effects when the CBA was negotiated. See *Johnson Bateman*, supra.

In view of the foregoing, I recommend dismissal of the allegations that ACS violated Section 8(a)(1) and (5) by requiring recalled seasonal workers to submit to drug testing under the negotiated drug policy.

2. Refusals to arbitrate grievances

a. Facts

The CBA has a no-strike, no-lockout provision and requires that all disputes and grievances be resolved under the grievance procedure in the agreement. The CBA includes a two-step formal grievance procedure prior to either arbitration or judicial enforcement. The CBA requires that formal grievances at step one and step two to be in writing, describe the facts, state the remedy sought and identify the sections of the CBA claimed to have been violated. If the grievance is not resolved at step two the CBA provides:

> 3. If the grievance is not resolved at the conference as provided for In STEP TWO above, then either party may request, in writing, within fifteen (15) days of the conference that the matter proceed in accordance with ARTICLE V. Failure of either party to give such written notice shall waive the rights to proceed in accordance with ARTICLE V.
>
> *ARTICLE V–ARBITRATION*
>
> 1. Disputes concerning contract interpretation, the disposition of assets, the right of sale, the right to control the number of hours that the plant be open or closed down either for lack of business or for economic reasons, or matters which involve management decision or business judgment shall not be subject to arbitration. Procedural questions of compliance with the contract shall be subject to judicial determination and not arbitration. Either party may seek judicial relief with regard to any of the foregoing.
>
> Any other disputes concerning working conditions, safety or other matters not excluded herein, shall be subject to arbitration; provided a written notice has been given as provided in ARTICLE lV, Section 3 above. The Company and the Union shall attempt by mutual agreement to appoint an arbitrator, then either party may request a panel of arbitrators to be submitted by the Federal Mediation and Conciliation Service, State Conciliation Service or American Arbitration Association, and an arbitrator shall be selected from such panel by the process of each party alternately eliminating one of the suggested names until there remains only one name on the panel. . . .

This contract language is identical to language in the April 1998–May 2002 Advanced Cooling agreement, with the exception that the "arbitrator" was substituted for "arbiter" in the 4th line of the final quoted paragraph.

The facts regarding the grievances that the Respondent is alleged to have unlawfully refused to arbitrate will be addressed individually. The record also contains evidence relating to a grievance addressing the issue of whether the CBA covered employees working for another entity, Dandy Cooling, LLC. The lawfulness of the refusal to arbitrate the Dandy Cooling grievance is not the subject of a complaint allegation and was not fully litigated. On January 13, 2004, prior to the filing of the charge, the Respondent's attorney had advised the Union's attorney by letter that the Respondent was refusing to arbitrate the Dandy Cooling grievance. The Respondent timely objected to the receipt of evidence regarding the Dandy Cooling grievance. Some evidence was received over objection, based on a representation that it was relevant to the allegations in complaint paragraph 6(b)(7), discussed below. As it developed, complaint paragraph 6(b)(7) relates to a completely different grievance. The Dandy Cooling grievance will not be considered further.

(1) Darlene Brazil performance memo and suspension grievance[4]

On March 4, 2003,[5] Union President Pete Maturino filed a written grievance with ACS Manager John Smith regarding a performance memo issued to unit employee Darlene Brazil for having a negative and uncooperative attitude and suspending her for 3 days. Smith replied in writing on March 14, denying the grievance. Maturino answered on March 14, offering to

[4] Complaint paragraph 6(b)(1).

[5] Unless otherwise indicated, all dates in this section are 2003.

meet regarding the grievance or proceed to arbitration. ACS continued to deny the grievance. By letter of May 30, Maturino advised Smith that the Union was sending the grievance to the union attorney to schedule the matter for arbitration. On June 10, a union attorney sent a letter to the agency that provided arbitrators requesting a panel of arbitrators for this grievance. The letter included the statement, "This matter is a labor dispute involving interpretation and application of a collective-bargaining agreement." A copy of the letter was sent to Smith. The Respondent has refused to arbitrate the grievance, contending that it is not a dispute that is subject to arbitration under the CBA.

(2) Michelle Almaguer work assignment grievance[6]

On March 14, Maturino filed a written grievance contending that employee Michelle Almaguer was improperly hired and paid from the piece rate pool generated by senior unit employees. Smith replied in writing on March 31, denying the grievance. Maturino answered on April 2, offering to discuss the grievance at a meeting scheduled for April 17. The grievance was not resolved. By letter of May 30, Maturino advised Smith that the Union was sending the grievance to the union attorney to schedule the matter for arbitration. On June 10, a union attorney sent a letter to the agency that provided arbitrators requesting a panel of arbitrators for this grievance. The letter included the statement, "This matter is a labor dispute involving interpretation and application of a collective-bargaining agreement." A copy of the letter was sent to Smith. The Respondent has refused to arbitrate the grievance, contending that it is not a dispute that is subject to arbitration under the CBA.

(3) Notice posting grievance[7]

On April 11, Maturino filed a written grievance contending that the provisions described in a notice to employees that had been posted by Advanced Cooling effective January 21, 2001, (the notice) must be followed by ACS. The notice memorialized a supplemental agreement reached during the term of the collective-bargaining agreement between the Union and Advanced Cooling regarding pay scale, seniority, and crew sizes when additional employees were hired. ACS's position, reflected in a March 31 memo from Smith to Maturino, was that the notice provisions had not been incorporated into the CBA and ACS was not bound by the terms reflected in the notice. The grievance was not resolved at step two and on June 10, a union attorney sent a letter to the agency that provided arbitrators requesting a panel of arbitrators for this grievance. The letter included the statement, "This matter is a labor dispute involving interpretation and application of a collective-bargaining agreement." A copy of the letter was sent to Smith. The Respondent has refused to arbitrate the grievance, contending that it is not a dispute that is subject to arbitration under the CBA.

(4) Steve Hobbs and Darlene Brazil grievance[8]

On May 8, Maturino filed a written grievance contending that an operator was improperly given a share of group piecework pay for work done by Hobbs and Brazil. The grievance was not resolved at step two and the Union requested arbitration. On June 10, a union attorney sent a letter to the agency that provided arbitrators requesting a panel of arbitrators for this grievance. The letter included the statement, "This matter is a labor dispute involving interpretation and application of a collective-bargaining agreement." A copy of the letter was sent to Smith. The Respondent has refused to arbitrate the grievance, contending that it is not a dispute that is subject to arbitration under the CBA.

(5) Performance and attitude grievance[9]

On March 4, Maturino filed a written grievance with Smith regarding a written warning issued to the entire crew on February 27, for asserted violations of company policy and a work rule. The grievance was not resolved at step two. Maturino met with Smith on May 22, and the grievance was discussed. On May 30, Maturino sent a letter to Smith stating that he was forwarding the matter to the Union's attorney to schedule arbitration. On June 10, a union attorney sent a letter to the agency that provided arbitrators requesting a panel of arbitrators for this grievance. The letter included the statement, "This matter is a labor dispute involving interpretation and application of a collective-bargaining agreement." A copy of the letter was sent to Smith. The Respondent has refused to arbitrate the grievance, contending that it is not a dispute that is subject to arbitration under the CBA.

(6) Drug-testing grievance[10]

The Union grieved the November 2003 drug testing of recalled seasonal workers, discussed supra. The grievance was denied at step two and on January 8, 2004, the Union requested arbitration in a letter from Maturino to Smith. The request for arbitration was renewed in a letter from the Union's attorney to the Respondent's attorney on February 8, 2004. By letter from the Respondent's attorney to the union attorney ACS refused to arbitrate the drug-testing grievance on February 12, 2004. The Respondent has refused to arbitrate the grievance, contending that it is not a dispute that is subject to arbitration under the CBA.

(7) Operation expansion grievance[11]

On December 12, Maturino filed a grievance in a letter to Smith alleging the violation of the CBA regarding the staffing and pay of employees in implementing an expansion and diversification of operations at the plant. The stated subject of the letter was "expansion of operations." There followed an exchange of letters regarding the issues. On January 8, 2004, Maturino wrote to Smith and stated that he would like to meet and negotiate regarding the issues, but would like to wait until the end of January so Smith could provide requested informa-

[6] Complaint paragraph 6(b)(2).
[7] Complaint paragraph 6(b)(3).
[8] Complaint paragraph 6(b)(4).
[9] Complaint paragraph 6(b)(5).
[10] Complaint paragraph 6(b)(6).
[11] Complaint paragraph 6(b)(7).

tion. On January 19, 2004, Smith replied by letter, stated that the information had already been provided and proposed dates to meet in February 2004. These documents are part of GC Exh. 15. The complaint alleges that by letters of January 8, 2004 and February 8, 2004, the Union requested arbitration of the December 12 expansion of operations grievance. The evidence, however, does not show that there was a request to arbitrate the December 12 grievance. The complaint also alleges a request for arbitration by letter on January 27, 2004, that was not established.

There is confusion in the record of the December 12 "expansion of operations" grievance (sometimes referred to in the record as the Leaf Tek or True Leaf issue) with a different grievance referred to in another January 8, 2004 letter from Maturino to Smith regarding "seniority and salary scale violation" that is also a part of GC Exh. 15. Maturino testified that the "seniority and salary scale violation" letter was the Union's grievance "that dealt with the company employing a fourth dispatcher and allowing the fourth dispatcher to be a part of the piece rate pool." Maturino suggested in his letter that because the dispatcher issue had already been discussed (prior to a grievance being filed), "I would be willing to proceed with Article 5-Arbitration on this issue. Would you please advise." There is no evidence that the Union otherwise requested arbitration of this grievance until the Union's attorney sent a letter to ACS's attorney on February 8, 2004, following the filing of the charge, stating that ACS had refused to arbitrate the "seniority and salary scale violation" grievance and demanding that the ACS proceed with arbitration. By letter of February 18, 2004, the ACS attorney responded to the Union's attorney. The ACS attorney reviewed the history of the grievance, took the position that the parties had not completed the steps preceding arbitration and expressed agreement that the grievance was subject to arbitration if it was not resolved through the grievance procedure. This evidence does not show that there was a refusal to arbitrate the "seniority and salary scale violation" grievance, which is not the subject of a complaint allegation.

b. Analysis of refusals to arbitrate

The CBA explicitly excludes from arbitration disputes concerning contract interpretation. The General Counsel has not proven and does not explicitly argue that the grievances at issue do not concern contract interpretation. Based on the record evidence, including the CBA, there was a sound arguable basis for the Respondent's position that the grievances concerned contract interpretation. There has been no showing that ACS was motivated by union animus or was acting in bad faith. See *Yellow Freight Systems, Inc*., 313 NLRB 309 (1993), and cases cited there.

A refusal to arbitrate a grievance is not presumptively a violation of the Act. *Velan Valve Corp*., 316 NLRB 1273 (1995), and the cases cited there. It is well settled that arbitration is matter of contract and party cannot be required to submit to arbitration any dispute that the party has not agreed to submit. *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986); *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991). "Whether or not a company is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court, and a party cannot be forced to 'arbitrate the arbitrability question.'" Id. at 208, quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 651 (1986). See also *Miller Compressing Co.*, 309 NLRB 1020, 1023 (1992).

The grievances that are subject to arbitration under the negotiated terms of the CBA are limited. The General Counsel does not contend that the contract provisions should be nullified, but that would be the effect of finding the violations alleged. It would be inappropriate and would exceed my authority to rewrite the contract negotiated by the parties. The Union was free to judicially challenge Respondent's asserted actions that were the subjects of the grievances or to file suit to compel arbitration, but had no right protected by the Act to have an arbitrator decide the grievance in the first instance.

In view of the foregoing I recommend dismissal of the allegations that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to arbitrate the grievances described in complaint paragraphs 6(a), 6(b)(1), 6(b)(2), 6(b)(3), 6(b)(4), 6(b)(5), and 6(b)(6). I recommend dismissal of the allegations that the Respondent violated the Act by refusing to arbitrate the grievances described in complaint paragraph 6(b)(7) because there was a failure of proof regarding the facts alleged. Assuming, without finding, that the facts alleged in complaint paragraph 6(b)(7) were proven, I recommend that the alleged refusal to arbitrate regarding that grievance also be dismissed for the same reasons as the other refusals to arbitrate.

CONCLUSIONS

1. ACS, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. United Food And Commercial Workers International Union, Local 1096, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not engaged in unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[12]

ORDER

The complaint is dismissed.

Dated, San Francisco, California June 6, 2005

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.